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9 Attorneys for Defendant
10 John Doe
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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

12 KEITH BIGGS, an individual,
13 Plaintiff,
14 vs.
15 DOES 1-25, inclusive,
16 Defendants.
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No.: 14-cv-00378-R-MAN

**DEFENDANT JOHN DOE'S
OPPOSITION TO MOTION
FOR RECONSIDERATION**

Date: June 16, 2014

Time: 10:00 a.m.

Honorable Manuel L. Real

Courtroom: 8, Second Floor

1 John Doe respectfully requests that the Court deny Plaintiff Keith Biggs's
 2 motion for reconsideration of this Court's decision to grant Doe's Motion to
 3 Quash Subpoena (Dkt. No. 17).

4 I. INTRODUCTION

5 The Court granted John Doe's motion to quash a subpoena Plaintiff Keith
 6 Biggs served on Google seeking documents associated with Doe's anonymous
 7 email account. The Court found that Biggs failed to provided notice to Doe, Biggs
 8 did not establish a prima facie case, and that the value of Doe's right to anonymous
 9 speech outweighed Biggs's need for discovery. The court allowed Biggs to conduct
 10 discovery on the portions of the subpoena not pertaining to Doe. Biggs now seeks
 11 reconsideration of the Court's order, claiming that "newly discovered evidence"
 12 justifies this generally disfavored procedure. Because Biggs fails to meet the high
 13 standard applied to motions for reconsideration, the Court should deny Biggs's
 14 motion.

15 II. STATEMENT OF FACTS

16 A. The Court granted Doe's Motion to Quash Subpoena, finding that Biggs 17 failed to provide notice and produce prima facie evidence to overcome 18 Doe's parody defense.

19 On January 16, 2014, Biggs initiated his complaint against 25 Does, claiming
 20 that defendants unlawfully obtained photographs from the Eliseerotic.com website
 21 and "posted fake, duplicated, and/or manipulated photographs" on Tumblr.com.
 22 (Dkt. No. 1, ¶¶ 8-9, 15-16.) On February 27, 2014, John Doe brought a motion to
 23 quash a subpoena Biggs served on Google, which sought documents that would
 24 reveal Doe's true identity. (Dkt. No. 12-1; *see* Dkt. No. 12-2 at 8-9.) Doe
 25 acknowledged that he posted comments about pornography and parodied
 26 commercial pornography. (Dkt. No. 12-1 at 2:19-3:6.) But Doe argued that the First
 27 Amendment protects his anonymous speech, and that Biggs failed to meet his
 28 burden of production. (*See* Dkt. No. 12-1.) As part of his opposition, Biggs argued
 that evidence linked Doe with the allegedly infringing conduct through the email

1 address <galvygalvy@gmail.com>, the Tumblr account ‘Galvygalvy’, and the IP
 2 address 24.179.112.228 and 68.118.245.34. (Dkt. No. 13 at 6.) Biggs opposition cited
 3 to and relied on a letter from Tumblr dated January 28, 2014 responding to a
 4 subpoena Biggs had served on it. (Dkt. No. 13-1 at 1-5.)

5 During the hearing on April 7, 2014, this Court found that because Doe
 6 engaged in anonymous speech through his pseudonym email address and blog
 7 accounts, Biggs must satisfy two basic requirements:

8 1) that he notified Doe of the subpoena; and

9 2) that he alleged a facially valid cause of action, produced prima facie
 10 evidence to support all the elements, and made a prima facie showing that
 11 it is possible to overcome Doe’s parody defense.

12 (Transcript from April 7, 2014¹ hearing (“Tr.”) at 3:19-4:18.) But Biggs failed to
 13 satisfy these requirements. “Weighing both Biggs’ failure to notify Doe and his
 14 inability to establish a prima facie case against Doe, the Court [found] that the
 15 value of anonymous speech outweighs Biggs’ needs for relevant discovery.” (*Id.* at
 16 5:18-22.) Biggs’s counsel did not appear at the hearing. (Dkt. No. 15.) On April 21
 17 the Court entered an order quashing the subpoena to Google. (Dkt. No. 17.)

18 **B. Biggs claims to have discovered new evidence—but this evidence was**
 19 **available to Biggs when he opposed the Motion to Quash, and moreover**
 20 **still fails to prove a prima facie case.**

21 On May 19, Biggs filed a motion for reconsideration. (Dkt. No. 18.) Biggs
 22 claims to have “newly discovered evidence that with reasonable diligence could not
 23 have been discovered in time”, mainly expert testimony from Eric Robi linking Doe
 24 with the email address <galvygalvy@gmail.com>, the Tumblr account
 25 ‘Galvygalvy’, and the IP address 24.179.112.228. (Dkt. No. 18 and 8.) As part of his
 26 analysis, Robi relies on emails from 2013—created months prior to this lawsuit’s
 27 inception. (Dkt. No. 18-2 at 15-19.) Robi also relies on the January 28, 2014 letter

28 ¹ A courtesy copy of this transcript is filed with this opposition as Exhibit A.

1 from Tumblr, previously cited by Biggs. (*Compare* Dkt. No. 13-1 at 2 *with* Dkt. No.
2 18-2 at 7.)

3 Biggs further claims that Doe committed perjury, pointing to Doe's
4 declaration statement filed in support of his motion to quash stating that: "I have
5 no information or ownership interest in
6 [www.blogger.com/profile/13746290171246332448]." (Dkt. No. 18 at 8-10; *see*
7 Dkt. No. 12-1 at 2 at ¶ 7, and 9.) Biggs points to documents produced by Google
8 indicating that the Blogger account associated with profile identification number
9 "13746290171246332448" is connected to Doe's email address
10 <galvygalvy@gmail.com>. (Dkt. No. 18 at 10; *see* Dkt. No. 18-2 at 5.) But the
11 statement was true at the time it was made. At the time Doe signed his declaration,
12 he did not know that he had a Blogger.com profile with the profile identification
13 number "13746290171246332448". (Doe Decl. ¶ 2.) At that time he believed that
14 he had no information or ownership interest in that blog. (*Id.*)

15 III. AUTHORITY

16 A motion for reconsideration is "an extraordinary remedy, to be used
17 sparingly." *Kona Enters., Inc. v. Est. of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). A
18 motion for reconsideration "should not be granted, absent highly unusual
19 circumstances, unless the district court is presented with newly discovered
20 evidence, committed clear error, or if there is an intervening change in the
21 controlling law." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (internal
22 quotation marks omitted). Local Rule 7-18 provides:

23 A motion for reconsideration of the decision on any motion may be
24 made only on the grounds of (a) a material difference in fact or law
25 from that presented to the Court before such decision that in the
26 exercise of reasonable diligence could not have been known to the
27 party moving for reconsideration at the time of such decision, or (b)
28 the emergence of new material facts or a change of law occurring after
the time of such decision, or (c) a manifest showing of a failure to
consider material facts presented to the Court before such decision.

1 The party seeking reconsideration is barred from “repeat[ing] any oral or written
 2 argument made in support of or in opposition to the original motion.” *Id.* This
 3 Court exercises its discretion when determining whether to grant a motion for
 4 reconsideration. *Navajo Nation v. Confederated Tribes and Bands of the Yakama*
 5 *Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003).

6 **A. Biggs either knew or could have discovered each “new” fact except for**
 7 **Doe’s connection to one additional blog.**

8 Biggs’s motion to reconsider is premised on his claim that he discovered
 9 new evidence that reasonable diligence could not have uncovered before the Court
 10 ruled on the Motion to Quash. (Dkt. No. 18 at 6:8-10.) This “new” evidence is
 11 limited to expert witness Eric Robi’s testimony (see Dkt. No. 18 at 6:5-7:7), which
 12 relies on 1) Robi’s general knowledge of how to “trac[e] the identity of an unknown
 13 individual on the Internet”, 2) the January 28, 2014 letter from Tumblr, 3) emails
 14 dated September 21, 2013 and October 5, 2013 that indicate that a user logged onto
 15 the Eliseerotic.com website from the IP address 24.179.112.228, and 4) Google’s
 16 production linking Doe to an additional blog. (Dkt. No. 18-1 at ¶¶ 2-20.)

17 While Biggs claims that expert witness Robi’s declaration is new evidence,
 18 it is same evidence previously available to Biggs, but packaged differently. Biggs
 19 already presented the January 28 Tumblr letter to the Court, and he had access to
 20 the emails dated September 21 and October 5, 2013 when he filed this suit. Had he
 21 retained Robi earlier, Robi could have opined on how to track the identity of
 22 Internet users and the information contained in the Tumblr letter and the 2013
 23 emails. All of this “new” evidence was available and readily accessible to Biggs
 24 when Doe brought his motion to quash. Without more, Biggs cannot meet the
 25 requisite standard.

26 **1. None of the “new” evidence is material.**

27 Biggs appears to claim that Google’s production—linking Doe to an
 28 additional blog that Doe previously disclaimed knowledge of—presents new

evidence. But Local Rule 7-18 requires Biggs to establish “the emergence of new *material* facts.” Local Rule 7-18(b)(emphasis added). According to Robi, Google’s production suggests a connection between Doe and blog posts relating to photographs Biggs took. But Doe has never disputed that he posted comments about pornography and parodied commercial pornography. In fact, Doe admitted that most of the blogs Biggs complained of were his. And this connection is the very basis of Biggs’s argument on opposition to the motion to quash. The addition of one more blog, containing the same type of parody as featured on the others, is neither here nor there. This is not new evidence, nor is it a *prima facie* showing sufficient to overcome Doe’s fair-use defense. (See Tr. 5:17-18.) Since the “new” evidence does not contain facts material to the legal issues at the heart of the Court’s decision, it does not provide a basis for granting this motion.

B. Biggs’s claim that Doe perjured himself does not constitute a basis for granting Biggs’s Motion for Reconsideration.

Biggs accuses Doe of committing perjury in violation of 18 U.S.C. §§ 1621 and 1623. Evidencing a complete misunderstanding of civil litigation, Biggs “assures [the Court] that a guilty verdict should be solidly found,” and demands that Doe be sanctioned or imprisoned. Without citing authority, Biggs also claims that Doe’s alleged perjury is a basis for granting his motion for reconsideration.

But Doe’s mistaken declaration is not perjury, and even if it was, a declaration omitting an immaterial fact (the addition of one more functionally identical blog) does not provide a basis to reconsider the court’s finding that Doe’s publication of Biggs’s pornography with additional elements added is parody. 18 U.S.C. §§ 1621 and 1623 require a finding that the declarant made a statement about a material matter knowing it to be untrue. 18 U.S.C. § 1621 (“willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true”); *id.* at § 1623 (“knowingly makes any false material declaration”); e.g. *United States v. Kelly*, 540 F.2d 990, 994 (9th Cir. 1976). Biggs

1 claims that Doe committed perjury when he stated in declaration: “I have no
 2 information or ownership interest in
 3 [www.blogger.com/profile/13746290171246332448].” (Dkt. No. 12-1 at 2 at ¶ 7,
 4 and 9.) But at the time Doe signed his declaration, he did not know that his
 5 Blogger.com profile had the profile identification number
 6 “13746290171246332448”. (Doe Decl. ¶¶ 2-3.) Biggs has not established that Doe
 7 committed perjury—or why this allegation is relevant to a motion for
 8 reconsideration.

9 **C. Biggs improperly attempts to use his motion for reconsideration as a**
 10 **surreply.**

11 Biggs’s motion includes a lengthy discussion of why the January 28 Tumblr
 12 letter is not hearsay. (Dkt. No. 18 at 7.) Biggs’s argument is a surreply to the
 13 argument raised in Doe’s reply in support of the motion to quash. (*See* Dkt. No. 14
 14 at 4.) *See* Local Rule 7-18 (“No motion for reconsideration shall in any manner
 15 repeat any oral or written argument made in support of or in opposition to the
 16 original motion.”) And, it is an irrelevant surreply – the Court did not rely on
 17 Doe’s hearsay objection in finding that Biggs failed to produce sufficient facts to
 18 establish a *prima facie* case on any his claims.

19 **D. Biggs still fails to identify a *prima facie* case.**

20 The Court found that “Biggs has failed to adequately plead the elements of
 21 computer fraud, only pleading that someone unauthorized accessed his Website”
 22 in addition to failing to meet the elements of copyright infringement or any of his
 23 other claims (Tr. 5:2-4.) Biggs’s complaint is rife with conclusion but completely
 24 lacking in detail. And Biggs’s filings with this court do nothing to remedy those
 25 defects. Biggs does not provide anything to rebut the fair use defense in order to
 26 proceed under a copyright infringement theory. He fails to allege \$5,000 in loss
 27 from the alleged computer hacking, a necessary prerequisite to bringing suit under
 28 18 U.S.C. § 1030. *see Multiven, Inc. v. Cisco Sys.*, 725 F. Supp. 2d 887, 891 (N.D.

1 Cal. 2010.) And he made no attempt to provide *any* evidence supporting his
2 invasion of privacy and harassment claims, or to tie Doe to any harassment other
3 than posting parodies of Biggs's pornographic photographs of Biggs's wife.

4 **IV. CONCLUSION**

5 Biggs seeks to re-litigate the motion to quash subpoena, claiming that he has
6 discovered new evidence. But Biggs cannot establish that highly unusual
7 circumstances exist to justify reconsideration—he still cannot establish any of his
8 claims, prove that he gave Doe notice of the subpoena, or overcome Doe's right to
9 anonymous speech when balanced against Biggs's desire to pursue a frivolous
10 lawsuit. Doe respectfully requests that the Court deny Biggs's motion for
11 reconsideration.

12
13 Dated: May 23, 2014.

14 **NEWMAN DU WORS LLP**

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17 _____
18 Derek Newman (State Bar No. 190467)
19 Attorneys for Movant John Doe
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EXHIBIT - A

1 UNITED STATES OF AMERICA
2 UNITED STATES DISTRICT COURT
3 CENTRAL DISTRICT OF CALIFORNIA
4 WESTERN DIVISION

5 - - -
6 HONORABLE MANUEL L. REAL
7 UNITED STATES DISTRICT JUDGE PRESIDING
8 - - -

9 KEITH BIGGS,)
10)
11) PLAINTIFF,) CERTIFIED COPY
12)
13 VS.) CV 14-37 R
14)
15 DOES 1 - 25,)
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17) DEFENDANTS.)
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21 REPORTER'S TRANSCRIPT OF PROCEEDINGS
22 MONDAY, APRIL 7, 2014
23 A.M. SESSION
24 LOS ANGELES, CALIFORNIA

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312 NORTH SPRING STREET, ROOM 402
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APPEARANCES OF COUNSEL:

ON BEHALF OF PLAINTIFF:
(NOT PRESENT)

ON BEHALF OF DEFENDANT:
DERRICK NEWMAN, ESQUIRE

1 LOS ANGELES, CALIFORNIA; MONDAY, APRIL 7, 2014

2 A.M. SESSION

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7
8 THE CLERK: Item No. 2: CV-14-37 Keith
9 Biggs versus Does 1 through 25.

10 Counsel.

11 MR. NEWMAN: Good morning, your Honor. My
12 name is Derrick Newman. I represent the third-party
13 movant John Doe.

14 THE COURT: Keith Biggs?

15 Any call?

16 THE CLERK: No, Your Honor, no call.

17 THE COURT: Doe defendant moves to quash the
18 subpoena of Keith Biggs.

19 Doe engages in anonymous speech through his
20 pseudonyms e-mail address GALV@gmail.com and related
21 blog accounts.

22 The Ninth Circuit has embraced balancing the
23 important value of anonymous speech against a party's
24 need for relevant discovery.

25 In Re Anonymous Online Speakers, 661 Fed 3rd

1 1168, Ninth Circuit, 2011. A plaintiff seeking to use a
2 subpoena to discover the identity of a defendant in
3 connection with anonymous internet speech must satisfy
4 two basic requirements.

5 Subject to balancing by the Court, first the
6 plaintiff must undertake reasonable efforts to give the
7 defendant adequate notice of the attempts to discover
8 his or her identity and prove a reasonable opportunity
9 to respond.

10 Second, the plaintiff must allege a facially
11 valid cause of action and produce prima facie evidence
12 to support all of the elements of the cause of action.

13 SaleHoo Group Limited versus ABC Company,
14 722 Fed Supp 2nd 1210, Western District of Washington,
15 2010.

16 For a fair-use parody of defense, the
17 plaintiff must make a prima facie showing that it is
18 possible to overcome the defense.

19 When evaluating parody, the Court balances:
20 One, the purpose of copying; two, the nature of the
21 protected work; three, amount of copying; and four, the
22 effects on plaintiff's market. Mattel Inc. versus
23 Walking Mountain Productions versus 353 of Fed 3rd, 792,
24 Ninth Circuit 2003.

25 Biggs failed to prove any notice to Doe

1 defendant despite having Doe defendant's e-mail address.
2 Biggs has failed to adequately plead the elements of
3 computer fraud, only pleading that someone unauthorized
4 accessed his Website. Ashcroft versus Iqbal, 556 U.S.
5 662, 2009.

6 Doe claims that any alleged copyright
7 infringement is fair use as parodying Biggs' work.
8 Biggs' response is only a general averment that those
9 photoshopped images, quote, Does not constitute parody,
10 close quote. But First Amendment protection does not
11 apply only to those who speak clearly, whose jokes are
12 funny and whose parodies succeed; nor does the
13 sexualized perspective of Does' photoshopped images
14 remove them from First Amendment protection. Mattel
15 Inc. versus Walking Mountain Productions, 353 Fed 3rd.
16 792, Ninth Circuit 2003.

17 Biggs has not made a prima facie showing
18 that he could overcome Does' fair-use defense. Weighing
19 both Biggs' failure to notify Doe and his inability to
20 establish a prima facie case against Doe, the Court
21 finds that the value of anonymous speech outweighs
22 Biggs' needs for relevant discovery. Does' motion to
23 quash the subpoena is granted.

24 Counsel, prepare the order.

25 MR. NEWMAN: Thank you, your Honor.

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(PROCEEDINGS CONCLUDED.)

CERTIFICATE OF REPORTER

COUNTY OF LOS ANGELES)
) SS.
STATE OF CALIFORNIA)

I, SHERI S. KLEEGER, OFFICIAL COURT REPORTER, IN AND FOR
THE UNITED STATES DISTRICT COURT FOR THE CENTRAL
DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT
TO SECTION 753, TITLE 28, UNITED STATES CODE, THE
FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE
STENOGRAPHICALLY REPORTED PROCEEDINGS HELD IN THE
ABOVE-ENTITLED MATTER AND THAT THE TRANSCRIPT PAGE
FORMAT IS IN CONFORMANCE WITH THE REGULATIONS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES.

DATE: MAY 21, 2014

/S/ _____

SHERI S. KLEEGER, CSR
FEDERAL OFFICIAL COURT REPORTER